**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF GEORGIA**
**(ATLANTA DIVISION)**

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| DON O. ROWE, MD,<br><br>Plaintiff,<br><br>v.<br><br>EMORY HEALTHCARE, INC.; EMORY CLINICALLY INTEGRATED NETWORK, LLC; THE EMORY CLINIC, INC., d/b/a EMORY HEART & VASCULAR CENTER AT JOHNS CREEK.<br>Defendants.<br>________________________________ | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Civil Action No.:<br>1:16-cv-00330-CC-JKL |

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENANTS' MOTION FOR SUMMARY JUDGEMENT**

**Plaintiff's Contentions and Factual History**

Prior to June 2013 Plaintiff, a board-certified cardiologist, completing both a residency and fellowship in cardiology, enjoyed a progressively successful career as a cardiologist at Emory Johns Creek Hospital. Once he complained about racially based disparate treatment all hell broke loose.

Following Plaintiff's complaint of ongoing disparaging and racially-discriminatory activity, Emory and its senior medical staff became openly hostile to Plaintiff, eventually terminating his employment for reasons which were purely pretextual. A neutral "peer review" made no finding that Plaintiff had done nothing wrong. In fact, the Panel thanked Plaintiff for the care he had rendered to this patient.

Following Plaintiff's termination, Emory engaged in a pattern of unlawful actions – which had no basis in fact – designed to prevent Plaintiff from securing alternative employment, including falsely claiming that there were medical malpractice charges pending against him, (ex.32, 33) and that he had violated the geographic limitations of Emory's non-competition agreement. (Pl. Dep. 169:20-25,170:1-4)

As a result of Emory's pattern of unlawful and discriminatory conduct, Plaintiff brings this action alleging discriminatory and retaliatory actions on the basis of his race under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 ("Section 1981") and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), as well as state contract law.

## STATEMENT OF FACTS

### Defendants' Discrimination During Plaintiff's Employment

Plaintiff is an African-American male cardiologist. (Ex. 1, 2, 3, 4, 5) Defendants are a network of commonly-owned and operated businesses operating medical facilities. Plaintiff accepted an offer of employment at The Emory Clinic, Inc., which was memorialized in an employment contract dated May 26, 2010. (Ex. 6) Pursuant to the terms of the employment contract, Plaintiff became a full-time member of the Section of Internal Medicine. Dr. Jeff Hershey was a general cardiologist at Emory Johns Creek (EJCH) who at one time served as Director and Dr. Greg Robertson was a cardiologist who became Director at EJCH. (Taylor Dec.¶ 10) Taylor and Hershey are both Caucasian. Plaintiff was employed as a cardiologist in the Department of Medicine at Emory University School of Medicine and The Emory Clinic, Inc. for nearly five (5) years. Jennifer Graham is a Nurse Practitioner assigned to work for Dr. Robertson. (Pl. Dep. 34:14-17) Plaintiff was assigned to work at the EJCH Center. (Taylor Dec.¶ 10) Alicia Brazerol worked on the front desk at EJCH. (Brazerol Dec.¶ 2) Quincy Wilson worked as a Scheduler at EJCH. (Wilson Dec.¶ 2) There was an under tone of race bias and stereotyping at EJCH. (Brazerol Dec.)

Cardiologists grow their practice and patient base by encountering new patients they see during hospital on-call shifts who are often experiencing their first cardiac concern, and by cultivating referrals from non-cardiologist physicians who they know. Some patients contact the Centers directly to request a consultation or make an appointment." (Taylor Dec.¶ 14)

In June 2013, Plaintiff discovered that white patients were being diverted away from him to white doctors. (Wilson Dec.) (Brazerol Dec.) Plaintiff complained to a colleague concerning his displeasure and frustration with this racist undertone of disparaging and racially discriminatory activity directed at him and others by and through Defendants' officers and/or agents. Specifically, Dr. Robertson and Dr. Hershey. (Pl. 41:12-15) (Wilson Dec. ¶¶ 3, 4, 5, 6, 7, 8) (Brazerol Dec. ¶¶ 2, 3, 4, 5, 6)

Plaintiff's complaint was received by Defendants' Office Manager, Director, and Human Resource Department. (Pl. Dep. 35:3-18) Defendants declare that they investigated the allegations of "stealing patients" and found none. (Taylor Dec.¶16) Dr. Taylor failed or refused to interview Mr. Wilson, a scheduler and Ms. Brazerol, who worked the front desk. Two employees who had firsthand knowledge regarding the assignment of patients.

Defendants, by and through their officers and/or agents, discriminated against Plaintiff by intentionally directing that new patients be assigned to white cardiologist and not to Plaintiff. Defendants also directed that new white patients be assigned to white cardiologists and new black patients be assigned to Plaintiff because he can better relate to the blacks. (Wilson Dec. ¶¶ 3, 4, 5, 6, 7, 8) (Brazerol Dec. ¶¶ 2, 3, 4, 5, 6)

Dr. Taylor's so-called investigation would utilize the unsubstantiated allegations of Jennifer Graham. (Ex. 12) The very person Plaintiff had complained to, claiming that the Plaintiff had spoken to her in abusive and insulting tones. (Pl. Dep. 41:17-25, 42:1-22, 43:1-25, 44:1-25,45:1-25, 46:1-25, 47:1-25, 48:1-25,49:1-25, 50:1-25, 51:1-25, 52:1-25, 53:1-25, 54:1-25) Plaintiff himself was issued a written reprimand. (Ex. 15) In the "confidential memo placed in Plaintiff's personnel file, Dr. Taylor states that plaintiff's statements were "misunderstood". (Ex. 14) Nonetheless, Plaintiff was required to apologize and then complete a daylong course on workplace professionalism and behavioral remediation.

Defendants also excessively scheduled Plaintiff for 'on call' duty over and beyond any other non-African-American physician on staff, and in a manner contrary to its own policies and procedures. (Ex. 30).

**Defendant's Pretextual Termination of Plaintiff's Employment**

On or about September 12, 2014, Plaintiff discovered that a patient was suffering from a very rare and life-threatening condition and subsequently made a life-saving diagnosis.

In the course of the treatment of this patient, Plaintiff made a standard "unverified / preliminary" note, which he subsequently revised and finalized according to common practice. "All the Doctors made amendments to the notes and dictations before they were finalized." (Wilson Dec.¶ 10)

Dr. Angel Leon reviewed Plaintiff's notes, after they had been finalized and confronted the Plaintiff. Dr. Leon acknowledged a "good" outcome. (Leon Dec.¶14) However, he either failed or refused to acknowledge that doctors frequently finalized their preliminary notes. (Wilson Dec.¶ 10) There was an allegation that Plaintiff had falsified the note. Plaintiff denied falsifying anything (Pl. Dep. 109:17-18) Dr. Leon told the Plaintiff, "I need to get you out of here." (Pl. Dep. 100:20) Plaintiff stated that he told Dr. Leon that he had changed his preliminary unverified note because information became available to him before he could finalize the note. (Pl. Dec. 98:13-25, 99:1-25, 100:18-20)

Dr. Leon would go on to contact Dr. Taylor. Plaintiff was placed on administrative leave on September 15, 2014. (Ex. 25) Two weeks later, on September 26, 2014, Defendants issued Plaintiff a letter or termination. (Ex. 26)

Plaintiff was replaced by a white cardiologist, Marc Veneziano. (Pl. Dep. 194:25)

After Plaintiff's termination a neutral evaluation "peer review" committee made no finding that Plaintiff had done anything wrong. In fact, the Panel thanked Plaintiff for the care he had rendered to this patient. (Ex. 28) Plaintiff, had made a lifesaving diagnosis (Pl. 92:20-23) and was complimented by his colleagues (Pl. 93: 1 – 3) including the patients nephew who was a general surgeon. (Pl. Dec. 106:22-25, 107:1-11)

Unfortunately, Plaintiff had already been fired. His employment has not been reinstated. Other black employees in Plaintiff's workplace had also been falsely accused and fired only to be exonerated later. But the black employees were not rehired. (Wilson Dec.¶ 11)

**Defendants' Post-Employment Retaliation**

On October 27, 2014, Plaintiff received a job offer from a new practice. Plaintiff was scheduled to begin work on or about February 2, 2015. In order to begin his new job, Plaintiff was required to apply for admitting privileges and credentials to hospitals associated with his new employer. Plaintiff submitted the proper paperwork, truthfully indicating he was not under any claims of medical malpractice. As a previous employer, Defendants received a verification form from Plaintiff's new employer regarding any claims of medical malpractice. Defendants falsely represented on the form that Plaintiff had an outstanding $2.3 million malpractice settlement. (Pl. Dep. Ex. 32)

Plaintiff's potential new employer told him they had concerns that he had lied on his application. (Pl. Dep. 153:23-24) Plaintiff then expended further time, money, and other resources to clear this alleged infraction on his professional record, including contacting Defendants. Defendants responded with a follow-up letter stating that the $2.3 million was a settlement amount but that nothing was paid or owed by Plaintiff. (Pl. Dep. Ex. 33) After many attempts, Plaintiff finally received a letter from Defendant Emory Healthcare, Inc. stating the alleged claim was reported in error and that there were no claims or judgments involving Plaintiff. (Pl. Dep. Ex. 34)

Defendants then, by and through Emory attorneys, contacted Plaintiff's new employer alleging Plaintiff was in violation of his non-compete agreement with Defendants by working at an office located at 2665 N Decatur Rd #320, Decatur, GA 30030. Further, Defendants threatened Plaintiff's new employer with legal action if it continued to employ Plaintiff. (Pl. Dec. 169:24-25,170:1-4) Contrary to Defendants' assertions, Plaintiff is employed at a venue located at 5910 Hillandale Dr. #350, Lithonia, GA 30058, and 2080 Eastside Drive, Conyers, GA, 30013 – well outside the 25-mile geographical scope of Defendants' non-competition agreement.

## ARGUEMENT AND CITATION OF AUTHORITY

### Standard of Review for Summary Judgment.

Summary judgment is not appropriate except where there exists **no genuine issue of material fact** and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c), emphasis added. Courts review all evidence and reasonable factual inferences drawn therefrom in the light most favorable to the party opposing the motion. *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501, 507 (11th Cir. 2000). Issues of fact and sufficiency of evidence are properly reserved for the jury. The only issue to be considered by the judge at summary judgment is whether the plaintiff's evidence has placed material facts at issue. Accordingly,[T]he grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, *is generally unsuitable in Title*

*VII cases in which the Plaintiff has established a prima facie case* because of the "elusive factual question" of intentional discrimination.

This Honorable Court may not consider any of the factual allegations or evidence preferred

Defendants concede in their Memorandum of Law attached to the Motion for Summary Judgment that there are genuine issues of material fact, thus they concede that a Motion for Summary Judgment cannot and should not be granted for all counts for which they raise in their motion. See, Report of the Commission on the Administration of Justice in New York State (1934), p. 383 (Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact.). Summary Judgment motions commonly contain a section entitled "undisputed facts". Here Defendants entitle the fact section of their memorandum, Statement of Facts, because they could not in good faith entitle the section "Undisputed Facts", as an overwhelming majority of the facts averred are facts in record contention.

The court shall grant summary judgment if the movant shows that there is **no genuine dispute as to any material fact** and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56.

The Supreme Court has recently reiterated and strengthened the rule that the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 (2000) (discussing standard for granting judgment as a matter of law under Fed.R.Civ.P. 50, which is the "same" as the standard for granting summary judgment under Rule 56). The Supreme Court has offered an additional important insight into the rule. "[T]he court should give credence to the 'evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' " *Id.* (citations omitted). In other words, courts must consider the entire record, but "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id*. at 2102. The Eleventh Circuit, as it must, completely endorses and adopts the *Reeves* standards. *Hinson v. Clinch County*, 231 F.3d. 821, 827 (11th Cir. 2000).

In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.

The Court must look only to the evidence and reasonable inference supporting Plaintiff and may not consider the evidence of the Defendant. See, Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (200) citing Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (we stated that "in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of" the nonmoving party).

The standard for both discrimination and retaliation claims has required an employee to establish an "ultimate employment decision" or make some other showing of substantiality in the employment context in order to establish an adverse employment action. *See* *Stavropoulos v. Firestone*, 361 F.3d 610, 616-17 (11th Cir.2004); *Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir.2000); *Davis v. Town of Lake Park, Fla*., 245 F.3d 1232, 1239 (11th Cir. 2001). The court defined ultimate employment decisions as those "such as termination, failure to hire, or demotion." *Stavropoulos*, 361 F.3d at 617. The 11th Circuit requires that conduct falling short of an ultimate employment decision must, in some substantial way, "alter[] the employee's compensation, terms, conditions, or privileges of, employment deprive him or her of employment opportunities, or adversely affect[] his or her status as an employee." *Gupta*, 212 F.3d at 587 (quotation and citation omitted). More particularly, when defining the level of substantiality required for a Title VII discrimination claim, the 11th Circuit requires an employee to demonstrate she suffered "a *serious and material* change in the terms, conditions, or privileges of employment" to show an adverse employment action. *Davis*, 245 F.3d at 1239 (emphasis added).

A tangible employment action "in most cases inflicts direct economic harm." *See* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54, 118 S.Ct. 2257, 2265, 141 L.Ed.2d 633 (1998).

To present a prima facie case of retaliation under Title VII, a plaintiff must adduce evidence sufficient to permit a rational trier of fact to find [1] that he engaged in protected participation or opposition under Title VII, [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action

Dr. Rowe is claiming disparate treatment under Title Vii and 1981 thus will discuss and this Honorable Court may consider the arguments relating to liability contemporaneously. See, Stallworth v. Shuler, 777 F.2d 1431, 1433 (11th Cir.1985) (stating that "[w]here, as here, a plaintiff predicates liability under Title VII on disparate treatment and also claims liability under sections 1981 and 1983, the legal elements of the claims are identical ... [and] we need not discuss plaintiff's Title VII claims separately from his section 1981 and section 1983 claims.").

To make out *prima facie* case of racial discrimination under Title VII or in § 1983 equal protection claim, plaintiff must show that: (1) he belongs to protected class; (2) he was qualified to do job; (3) he was subjected to adverse employment action; and (4) his employer treated similarly situated employees outside his class more favorably. *Crawford v. Carroll*, 529 F.3d 961, 962 (11th Cir. 2008) citing U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–2(a).

**Direct Evidence Discriminatory Intent**

In *Bass v. Board of County Comm'r*, 256 F.3d 1095 (11th Cir., 2001) the Eleventh Circuit defined direct evidence of discrimination as "evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) In order for statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision. Doctors Robertson and Hershey were cardiologists directly involved in the decision to divert patients. Declarations by Wilson and Brazerol that these doctors ordered patients diverted away from the Plaintiff because he is black, constitute direct evidence of discriminatory intent.

**Material Facts and Disparate Treatment**

A plaintiff can establish a claim for disparate treatment through direct or circumstantial evidence. *Crawford v. Carroll*, 529 F.3d 961, 975-76 (11th Cir. 2008). Discrimination can be shown indirectly by following the ”“pretext‘’ method of proof set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Under *McDonnell Douglas*, a plaintiff must first prove a prima facie case of discrimination. *See also* *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000).

The burden of establishing this prima facie case in employment discrimination cases is ” “minimal.‘’ *See, e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *see also* *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207

(1981)(”“not onerous‘’). In this case there is evidence that Plaintiff was qualified for the position which he held, Plaintiff had performed as a cardiologist in a professionally acceptable manner. Defendants’ management’s adverse and/or negative activity directed against Plaintiff did not occur until Plaintiff complained about ongoing disparaging and racially-discriminatory actions against him. Emory and its senior medical staff became openly hostile to Plaintiff, eventually terminating his employment because he finalized a preliminary medical note, claiming that he falsified a medical record. After Plaintiff was terminated, he was replaced by Marc Veneziano, a white cardiologist.

If a plaintiff is successful in establishing a prima facie case of discrimination, the burden then shifts to the defendant to produce a legitimate, nondiscriminatory justification for its actions. *Russell,* 235 F.3d at 222. When the defendant can articulate a reason that, if believed, would support a finding that the action was nondiscriminatory,” “the “mandatory inference of discrimination' created by the plaintiff's prima facie case “drops out of the picture' and the factfinder must “decide the ultimate question: whether [the] plaintiff has proved [intentional discrimination].' ‘’ *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). In making the showing on this ultimate question," "the plaintiff can rely on evidence that the employer's reasons were a pretext for unlawful discrimination,‘’ *id.*, and the factfinder ""may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom[.]' ‘’ *Id.* (quoting *Reeves*, 120 S.Ct. at 2106).

**Retaliation**

Under the McDonnell Douglas framework, after a plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory employment action. Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1094-95 (1981). Plaintiff complained to Defendants about what he thought was unlawful treatment because of his race, in return he was reprimanded. Dr. Taylor whose inquires either failed or refused to discover the discriminatory activities at the center and found fault with the Plaintiff, tacitly condoned and sought to cover up Defendants' discrimination. Plaintiff's reprimand followed his complaint of discrimination.

After the defendant presents such a reason, the plaintiff must set forth evidence that the reason is mere pretext for discrimination. McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825. *Phillips v. McHugh* (11th Cir., 2013) Plaintiff points to the affidavits of Wilson and Brazerol. Defendants who could support his claims that the reprimand was a pretext to cover up their own discriminatory conduct.

**Defendants' Pretextual Termination Analysis**

Defendants' rationale for Plaintiff's termination is that Plaintiff falsified a medical record. Plaintiff finalized a preliminary unverified note. There is evidence that "All the doctors made amendments to the notes and dictations before they were finalized." (Wilson Dec.¶ 10) After Plaintiff's termination a neutral evaluation "peer review" committee made no finding that Plaintiff had done anything wrong. In fact, the Panel thanked Plaintiff for the care he had rendered to this patient. (Ex. 28) Plaintiff, had made a lifesaving diagnosis (Pl. 92:20-23) and was complimented by his colleagues (Pl. 93: 1 – 3) including the patient's own nephew who was himself a general surgeon. (Pl. Dec. 106:22-25, 107:1-11)

The Supreme Court states that" "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.‘’ *Reeves,* 120 S.Ct. at 2108. "“Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.‘’ *Id.* at 2109; *see also Russell*, 235 F.3d at 224 (finding plaintiff "“provided sufficient evidence to create a jury issue that [the employer's] justification was pretextual‘’).

**Disparate Treatment Application**
**Reprimand, Accusation and Termination**

The Supreme Court has explained that a factfinder may infer the ultimate fact of discrimination (here retaliation, reprimand and termination) from the falsity of the explanation. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). In such cases, a plaintiff may withstand a motion for summary judgment without adducing additional, independent evidence of retaliation.

Dr. Taylor's reason for Plaintiff's reprimand was false and did not reflect the latent hostility toward him by Robertson and Hershey. His "confidential memos" placed in plaintiff's personnel file, the letters of reprimand, the orders to counseling should all be considered "pretextual cover ups" and, Taylor's failure or refusal to discover the orders given by Robertson and Hershey, at the very least, tacitly condone the activities of Robertson and Hershey environment or chose to ignore it. With regard to unsubstantiated allegations, Dr. Taylor's very declaration and the reprimand, exhibit a subjective bias towards plaintiff as an African American cardiologist on his staff.

**Prime Facie Showing**

Plaintiff was qualified for the position which he held prior to being terminated, and had performed the job in a professionally acceptable manner. Management's adverse and/or negative comments directed against Plaintiff did not occur until Plaintiff raised concerns about ongoing disparaging and racially-discriminatory activity, Emory and its senior medical staff became openly hostile to Plaintiff, eventually terminating his employment for reasons which were purely pretextual. After Plaintiff was terminated, he was replaced by Marc Veneziano, a white cardiologist.

The Supreme Court has explained that a factfinder may infer the ultimate fact of discrimination (here retaliation by cover up and unsubstantiated charges, reprimand and termination) from the falsity of the explanation. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). In such cases, a plaintiff may withstand a motion for summary judgment without adducing additional, independent evidence of retaliation.

**Plaintiff Has Made a Prima Facie Case of Racial Discrimination under Title VII & 42 USCA 1981**

Plaintiff is and was at all relevant times is an African American (Black) male and member of a suspect class. He was a Medical Doctor in the Emory Healthcare system, trained in residency within the Emory Healthcare system, and qualified as a specialist in Cardiology at Emory Healthcare. Dr. Rowe was subjected to adverse employment action including hostile work environment, professional sabotage, and unjustified termination after his earnings exceed the Emory unspoken “Black Cap” on earnings by exceeding his initial $262,000 salary. He was the only Black Cardiologist at Emory Johns Creek, and was treated differently than other similarly situated but white Cardiologist at Emory Johns Creek.

There are Genuine Issues of Material Fact as to Hostile Work Environment & Racial Harassment.

The Eleventh Circuit recognizes "hostile work environment" as a cause of action. Gowski v. Peake, 682 F.3d 1299, 1312 (11th Cir. 2012). The claim of hostile work environment is inherently one for the jury as it requires findings of fact as to intent and perceptions both objectively and subjectively. Whether an environment is hostile or abuse can be determined only by looking at all the circumstances. Id. The question is whether harassment was severe or pervasive, and whether the behavior resulted in an environment that a reasonable person would fiend hostile or abuse and that the victim subjectively perceives to be abusive. Id. at 1313.

Given Congress's intention to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment, it makes sense to construe the qualifier (regarding "compensation, terms, conditions, or privileges of employment") broadly. On that basis, the verb "discriminate," as used in section 2000e–2(a)(1), logically includes subjecting a person to a hostile work environment.... Title VII's anti-retaliation provision ... directs an employer not to discriminate against any employee "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” 42 U.S.C. § 2000e–3(a). Here, the term “discriminate” appears without the qualifier. A familiar canon of construction teaches that a term appearing in several places in a statutory text is generally read the same way each time it appears. We apply that canon here. The result: the verb “discriminate” in the anti-retaliation clause includes subjecting a person to a hostile work environment.

Termination of employment is sufficient to satisfy the “adverse action” element of Title VII and USCA 1981.

In order to satisfy “adverse employment action” element of Title VII discrimination action, employee must show either ultimate employment decision, i.e. termination, failure to hire, or demotion, or, for conduct falling short of ultimate employment decision, serious and material change in terms, conditions or privileges of employment. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–2(a).

**Plaintiffs Have Established Pretext**

The question of pretext is a jury question and precludes summary judgment. To establish pretext, a plaintiff must demonstrate that (1) the proffered reason had no basis in fact: (2) the proffered reason did not actually motivate plaintiff’s termination, or (3) the proffered reason was insufficient to motivate plaintiff's discharge. Martin v. Toledo Cardiology Consultants, Inc. 548 F.3d 405 (6thCir. 2008). Questions of motive and intent are for the fact finder. That is why summary judgment is discouraged in employment discrimination cases.

Given Congress's intention to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment, it makes sense to construe the qualifier (regarding "compensation, terms, conditions, or privileges of employment") broadly. On that basis, the verb "discriminate," as used in section 2000e–2(a)(1), logically includes subjecting a person to a hostile work environment .... Title VII's anti-retaliation provision ... directs an employer not to discriminate against any employee "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e–3(a). Here, the term "discriminate" appears without the qualifier. A familiar canon of construction teaches that a term appearing in several places in a statutory text is generally read the same way each time it appears. We apply that canon here. The result: the verb "discriminate" in the anti-retaliation clause includes subjecting a person to a hostile work environment.

## **Prayer for Relief**

Plaintiff prays that summary judgment be denied and the Court find that a material issue of fact exists herein.

Respectfully submitted this 17th day of January, 2017.

**THE CHESTNUT FIRM, LLC**
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## CERTIFICATE OF COMPLIANCE WITH FORMATTING REQUIREMENTS

The undersigned certifies that Times New Roman, Font 14 point, was used in the preparation of this document pursuant to N.D. Ga. LR 7.1.

Respectfully submitted this 17th day of January, 2017.

**THE CHESTNUT FIRM, LLC**

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## CERTIFICATE OF SERVICE

**I CERTIFY that I have filed the foregoing** ***PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENANTS' MOTION FOR SUMMARY JUDGEMENT*** thereof with the clerk of court using the CM/ECF-GA system which will automatically send notice of such filing to all attorneys of record.

This 17th day of January, 2017.

**THE CHESTNUT FIRM, LLC**

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